MOTION FILED
JUL 21 1987

[redacted]

87-118 (3)

NO. _____

COPY

In The

Supreme Court of the United States

OCTOBER TERM, 1986

DIANE HERCEG and ANDY VINES,
Petitioners

v.

HUSTLER MAGAZINE, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, WITH BRIEF ANNEXED.

James J. Clancy *
9055 La Tuna Canyon Rd.
Sun Valley, CA 91352
(818) 352-2069
Counsel for Amicus Curiae

Charles H. Keating, Jr.
2735 E. Camelback Road
P.O. Box 29099
Phoenix, Arizona 85038
(602) 957-7170
Amicus Curiae

BEST AVAILABLE COPY

46 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUBJECT INDEX

Page

Motion of Charles H. Keating, Jr., For Leave to File a Brief as Amicus Curiae in Support of Petitioners, with Brief annexed...1-11

Statement of Facts.....12-15

Statement of the Case.....15-16

Reasons for Granting the Writ....16-29

I

THE RIGHT OF A STATE GOVERNMENT TO AUTHORIZE REDRESS FOR TORTIOUS CONDUCT IS FUNDAMENTAL TO CIVILIZED SOCIETY..... 16

II

PETITIONERS' THEORY THAT HUSTLER MAGAZINE "INCITED" THE DECEASED TO ENGAGE IN EXCEEDINGLY DANGEROUS CONDUCT WHICH WAS LIKELY TO RESULT IN, AND DID IN FACT RESULT IN, HIS DEATH, CONSTITUTES A VIABLE GROUND FOR RECOVERY UNDER STATE TORT LAW. THAT ISSUE IS NOT BEFORE THIS COURT..... 17

III

THE COURT OF APPEALS APPLIED THE WRONG TEST. BRANDENBERG v. OHIO IS IN-

Page

APPOSITE. A TORT ACTION BASED UPON "INCITATION" TO THE PRURIENT INTEREST IS CONTROLLED BY U.S. v. REBHUHN AND GINZBURG v. UNITED STATES..... 18

IV

BEFORE THE COURT OF APPEALS MAY REVERSE, ON FIRST AMENDMENT GROUNDS, A JURY VERDICT WHICH AUTHORIZES REDRESS FOR TORTIOUS CONDUCT PURSUANT TO A VIABLE GROUND FOR RECOVERY UNDER STATE LAW, IT MUST MAKE AN INDEPENDANT EXAMINATION OF THE WHOLE RECORD, INCLUDING THE CHARACTER AND CONTENT OF THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE..... 21

V

THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE IS PER SE OBSCENITY. REASONABLE MINDS WOULD NOT DIFFER AND ALL REASONABLE PERSONS WOULD AGREE THAT HUSTLER IS OBSCENE AS A MATTER OF LAW (NOT FACT) UNDER THE FEDERAL STANDARDS SET FORTH IN MILLER v. CALIFORNIA..... 24

VI

THE ARTICLE ENTITLED "ORGASM OF DEATH" IN THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE AT PAGES 33-34 IS NOT ENTITLED TO FIRST AMENDMENT

Page

PROTECTION. IT CLEARLY CONSTITUTES "PANDERING" UNDER GINZBURG v. UNITED STATES..... 27

CONCLUSION..... 28

TABLE OF AUTHORITIES CITED

CASES

PAGE

Boreta Enterprises, Inc. v. Dept. of Alcoholic Beverage, 2 Cal.3d 85..... 26

Bose Corp. v. Consumers Union of the U.S., 466 U.S. 485 (1984)....22,23

Brandenberg v. Ohio, 395 U.S. 444.....8, 18, 29

Collins v. State Beverage Dept., 239 S.2d 613 (1970)..... 25

Flying Eagle v. U.S., 285 F.2d 307 (1st Cir., 1961)..... 28

Ginzburg v. U.S., 383 U.S. 463 (1966)..... 8, 10, 19, 23, 27, 29

Hustler Magazine, Inc. v Diane Herceg and Andy Vines, 814 F.2d 1021..... 17

Kahm v. United States, 300 F.2d 78 (5th Cir.)..... 24

Page

Kaplan v. California,
413 U.S. 115 (1973)..... 26

Miller v. California,
413 U.S. 15 (1973)..... 19, 27

Mitchum v. State of Florida,
251 S.2d 298 (1971)..... 24

Morris v. U.S.,
257 A.2d 341 (1969)..... 25

Paris Adult Theater, Inc. v.
Slaton, 413 U.S. 49 (1973)..... 26

Pope v. Illinois,
481 U.S. ___ (1987)..... 27

Roth v. U.S.,
354 U.S. 476..... 8, 19, 22

U.S. v. One Reel of Film,
41 F.2d 206 (1973)..... 26

United States v. Rebhuhn,
109 F.2d 512..... 8, 10, 19, 23,29

United States v. Wild,
422 F.2d 34 (2nd Cir., 1970)..... 24

United States v. Womack,
(Womack v. United States),
111 U.S.App.D.C. 8, 294 F.2d 204.... 24

Wilhoit v. U.S.,
229 A.2d 505 (1971)..... 25

Page

TEXTBOOKS, TREATIES, REPORTS

1 Pollock and Maitland, The History of English Law 46 (Legal Classes ed. 1982)..... 16

Psychopathia Sexualis (1886) by Krafft-Ebbing..... 6

The Report of the Commission on Obscenity and Pornography..... 2,3

In The

Supreme Court of the United States

OCTOBER TERM, 1986

DIANE HERCEG and ANDY VINES,
Petitioners

v.

HUSTLER MAGAZINE, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF CHARLES H. KEATING, JR., FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS, WITH BRIEF ANNEXED.

Charles H. Keating, Jr., (hereinafter referred to as "moving party") respectfully moves, pursuant to Rule 36.1 of the Rules of the United States Supreme Court, for leave to file a brief as amicus curiae in support of the Petitioners

herein. The consent of the Petitioners has been obtained. The consent of the Respondent, Hustler Magazine, Inc., was requested from counsel for Respondent by phone. In a phone conversation on July 22, 1987, Respondent's counsel stated that Respondent would not consent.

Moving party has a special interest in the Petition for Writ of Certiorari herein, both as the founder of "Citizens for Decency through Law, Inc." (short title "C.D.L."), and as a former member of the 1967 Presidential Commission on Obscenity and Pornography, and the author of one of the dissenting statements from that Commission's report. Moving party's interest in this particular case is the result of moving party's experience as a member of the Presidential Commission.

At page 542-546 of his dissenting statement from "The Report of the Comm-

ission on Obscenity and Pornography", moving party addressed the subject of "EFFECTS OF PORNOGRAPHY" and his unsuccessful effort as a member of the Presidential Commission to have the Commission authorize a study of "the practical aspect of what has been happening -- that is, what the statistics demonstrate regarding police cases, in which a relationship has been found to exist between anti-social conduct and obscenity." The study which moving party advocated is described in detail in a memorandum to Chairman Lockhart, dated August 11, 1969, entitled "MEMORANDUM RE STATISTICAL STUDY OF RELATIONSHIP OF OBSCENITY TO CRIME AND OTHER ANTI-SOCIAL BEHAVIOR", which is set forth in full at pp. 559-582 of the Commission Report as exhibit "C" to the dissenting statement.

///

The focus of moving party's memorandum of August 11, 1969 was placed upon the case histories which had been marshalled in two pilot studies which moving party had personally sponsored, in which law enforcement officers in two California cities were interviewed as to police reports within their personal knowledge, wherein a relationship had been found to exist between anti-social conduct and obscenity. One of those case histories involved the sexual practice of "Auto-erotic Asphyxiation" and was described by Lieutenant Ernest Vandergrift at page 574 as follows:

> 16. Sex Perversion - Suicide - H---- Case - D.R. 64-5456. "The body was discovered by the wife of the suspect, who is 24 years old. He attended law school. She found him lying on the bed in a supine position, face down and naked. On top one end of a rope was tied to his ankles, the other end was around his throat. A pair of white sox (sic) kept the rope from connection with

his skin as did a towel around his throat. She screamed and the neighbor came in and cut the ropes. The Fire Department tried resuscitation and called the police. When the police arrived, his ankles were still trussed but rigor mortis had set in. Just above him on the bed were 5 or 6 nudist magazines (2 were Sun and Sport), all open to female forms. When he was moved, it was found he had a contraceptive on and had an emission on the bed. All windows, doors were locked. The neighbors had seen him enter and he had no visitors until his wife came home. In the investigation with the Coroner's office the Los Angeles County Sheriff disclosed a type of masochism -- in which sexual excitement is reached upon tying oneself up and hanging to almost a point of blackout -- substantiated by psychiatry and case histories. Interrogation of suspect's wife revealed that ever since their marriage he was unable to obtain satisfactory intercourse without the use of ropes, being tied up and subjected to this before he could perform satisfactorily. He had received psychiatric help for 8 years. The death was accidental -- he did not intend to do it. In Los Angeles County, cases of this type occur about 6 times a year in which the defendant goes too far. He had sox (sic) on and a towel on his throat to prevent rope marks."

///

When the details of the above case histories on "Auto-erotic asphyxiation" were first brought to our attention, moving party and the attorney who was conducting the two pilot studies reacted with incredulity, even though each had ten years of experience in the area of obscenity litigation -- the abnormal sexual practice of "Auto-erotic asphyxiation" was that uncommon in 1969. However, at that time, both readily understood and accepted the fact that abnormal sexual behavior of that order did exist in the world, that it must have been as old as man, and that additional data would, more than likely, be found in scientific treatises on abnormalities, such as the works of Krafft-Ebbing, author of "Psychopathia Sexualis" (1886).

The "incredulity" which was expressed in 1969, was understandable, but was not

then a cause for alarm. That was so because the law was eminently clear that such discussion belonged in scientific treatises, and that, when and if one ventured into that area of "discussion", as Hustler Magazine did in this case, the right to treat such matters was not a broad First Amendment right to broadcast the abnormality indiscriminately to the community at large, as the Court of Appeals erroneously holds in this case. Three years earlier, this Court had specifically held to the contrary, in affirming the five year jail sentence of Ralph Ginzburg, where the actor's conduct was held to constitute "pandering"; i.e., "one who advertises and sells a work on the basis of its prurient appeal". See, in this regard, the opinion of Justice Learned Hand, often called the father of modern obscenity law, speaking in United

States v. Rebhuhn, 109 F.2d 512, cited with approval by Associate Justice Brennan of this Court in Ginzburg v. United States, 383 U.S. 463, 472-475 (1966), appearing hereinafter at page 19. of this amicus curiae brief.

Moving party submits that the right to discuss sexual matters is not unrestricted as the Court of Appeals' opinion below holds, and that it ceases to be so when the facts demonstrate, as shown in the record herein, that the actor is "pandering" in obscenity. In such a case, Brandenburg v. Ohio, 395 U.S. 444 is inapposite. The controlling precedents are Roth v. United States, 354 U.S. 476, 485-486 (1959); U.S. v. Rebhuhn, 109 F.2d 512 and Ginzburg v. United States, 383 U.S. 463, 472-475 (1966).

The Court of Appeals, in failing to recognize the "pandering" conduct of

Hustler Magazine as being of paramount importance to its analysis, is clearly in error. That the court below was unanimous in its error should concern this Court, and should cause its members to question whether the obscenity opinions of this Court have not resulted in the elevation of sexual matters to a position of unwarranted importance. The increase in the number of news items which report on tragic events similar to the death of Troy Daniel Dunaway, see news items appearing at appendix "A" to this amicus curiae brief, -- all innocent victims of pornography -- suggests that the societal value which underpins Judge Learned Hand's analysis, is seriously misunderstood by the Federal Judges, and that such misunderstanding can be traced to this Court's opinions, and its failure to articulate the societal values expressed by Justice Learned Hand.

The failure of Circuit Judge Alvin B. Rubin's opinion to say one word of what Hustler Magazine contains is inconsistent with the thoughtful analysis and values expressed by Judge Learned Hand in U.S. v. Rebhuhn, supra, as expressly approved in Ginzburg v. United States, supra. Further, moving party submits that had concurring and dissenting Circuit Judge Edith H. Jones been cognizant of the constitutional values which are inherent in Rebhuhn and adopted by reference in Ginzburg, hers would have emerged from the court's deliberation as the majority opinion, and the judgment below would have been affirmed.

The arguments presented herein, re an "incitement to prurient interest" in this amicus curiae brief, is not discussed in either the opinions below or in the

Petition for Writ of Certiorari on file herein and, therefore, moving party respectfully requests that he be granted leave to file this brief amicus curiae setting forth the same, for such assistance as it may provide to the individual Justices sitting herein. Because the August, 1981 copy of Hustler Magazine is a material part of the arguments of amicus curiae, a copy of the same is being lodged with the Clerk of this Court, concurrently with this motion.

DATED: July 18, 1987

Charles H. Keating, Jr.
Moving Party

James J. Clancy
Counsel for Moving Party

STATEMENT OF FACTS

The facts are set forth in Circuit Judge Alvin B. Rubin's opinion as follows (see Petition for Writ of Certiorari at pp. 2A-5A):

In its August 1981 issue, as part of of a series about the pleasures -- and dangers -- of unusual and taboo sexual practices, Hustler Magazine printed "Orgasm of Death", an article discussing the practice of autoerotic asphyxia. This practice entails masturbation while "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm. The article included details about how the act is performed and the kind of physical pleasure those who engage in it seek to achieve. The heading identified "Orgasm of Death" as part of a series on "Sexplay", discussions of sexual pleasures (that) have remained hidden for too long behind the doors of fear, ignorance, inexperience and hypocrisy" and are presented "to increase (readers') sexual knowledge, to lessen their inhibitions and -- ultimately -- to make them much better lover(s)."

An editor's note, positioned on the page so that it is likely to be the first text the reader will read, states: "Hustler emphasizes the often-fatal dangers of the practice of 'auto-erotic asphyxia', and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here

solely for an educational purpose."

The article begins by presenting a vivid description of the tragic results the practice may create. It describes the death of one victim and discusses research indicating that such deaths are alarmingly common: as many as 1,000 United States teenagers die in this manner each year. Although it describes the sexual "high" and "thrill" those who engage in the practice seek to achieve, the article repeatedly warns that the procedure is "neither healthy nor harmless", "it is a serious -- and often-fatal -- mistake to believe that asphyxia can be controlled", and "beyond a doubt -- ...auto-asphyxiation is one form of sex play you try only if you're anxious to wind up in cold storage, with a coroner's tag on your big toe." The two-page article warns readers at least ten different times that the practice is dangerous, self-destructive and deadly. It states that persons who successfully perform the technique can achieve intense physical pleasure, but the attendant risk is that the person may lose consciousness and die of strangulation.

Tragically, a copy of this issue of Hustler came into the possession of Troy D., a fourteen-year-old adolescent, who read the article and attempted the practice. The next morning, Troy's nude body was found, hanging by its neck in his closet, by one of Troy's closest friends, Andy V. A copy of Hustler Magazine, opened to the article about the "Orgasm of Death", was found near his feet.

///

Invoking the diversity jurisdiction of a federal court, Troy's mother, Diane Herceg, and Andy V. sued Hustler to recover damages for emotional and psychological harms they suffered as a result of Troy's death and for exemplary damages. Their original complaint alleged that Hustler was responsible for Troy's death on grounds of negligence, products liability, dangerous instrumentality, and attractive nuisance. In response, Hustler filed a motion to dismiss the complaint for failure to state a claim. The district court granted Hustler's motion on the basis that Texas law did not support some of the claims and others were barred by the first amendment, but it noted that the first amendment did not bar claims based on incitement and that it was "conceivable that plaintiffs could prove facts showing that Hustler's article was 'directed to inciting or producing' (Troy's death and) was 'likely to incite or produce' the death." It therefore granted leave to the plaintiffs to amend the complaint "to add an allegation of incitement." The plaintiffs subsequently filed an amended complaint reasserting the claims previously raised and adding an allegation that Troy had read the article and was incited by it to perform the act that resulted in his death. Hustler responded by filing a motion for summary judgment. The district court treated the motion as a motion to dismiss, granted the motion, and dismissed the suit insofar as it was based on any theory except incitement.

The incitement claim was then tried before a jury. Expert witnesses testified on behalf of both the plaintiffs and the defendant about the psychological implications of Troy's behavior and whether the magazine article implicitly advocated

the practice it described or was likely to incite readers to attempt the procedure. The jury returned a verdict in favor of the plaintiffs awarding Diane Herceg $69,000.00 in actual damages and $100,000.00 exemplary damages and awarding Andy V. $3,000.00 for the pain and mental suffering he endured as the bystander who discovered Troy's body and $10,000.00 exemplary damages. Hustler moved for a judgment notwithstanding the verdict or for a new trial, and the plaintiffs moved to amend the judgment to provide for pre-judgment interest. The trial court denied both motions.

Hustler appealed, and the Court of Appeals reversed the judgment on the grounds that tort liability could not be imposed on Hustler Magazine, pursuant to the theory that the article was an "incitement" to attempt a potentially fatal act, without impermissibly impinging upon freedom of speech.

STATEMENT OF THE CASE

The primary issue in this Petition is set forth in Circuit Judge Alvin B. Rubin's majority opinion as follows: (see Petition for Writ of Certiorari at page 8a):

> "While the plaintiffs alleged several different bases of liability in their original amended complaint, the issue tried was the imposition

> of liability on the basis of incitement, and that is the sole basis for the verdict. The question before the Court, therefore, is whether, as a matter of law, the language of 'Orgasm of Death' may be defined as incitement for purposes which would remove that speech from the purview of first amendment protection..." (our emphasis)

REASON FOR GRANTING THE WRIT

I

THE RIGHT OF A STATE GOVERNMENT TO AUTHORIZE REDRESS FOR TORTIOUS CONDUCT IS FUNDAMENTAL TO CIVILIZED SOCIETY.

The right of a severely injured party to obtain redress in a court of law against the person whose conduct clearly caused the injury is fundamental to civilized society. The right was won only after a centuries-long struggle against self-help, blood-feud, and anarchy. 1 Pollock and Maitland, The History of English Law. 46 (Legal Classics edition 1982).

II

PETITIONERS' THEORY THAT HUSTLER MAGAZINE "INCITED" THE DECEASED TO ENGAGE IN EXCEEDINGLY DANGEROUS CONDUCT WHICH WAS LIKELY TO RESULT IN, AND DID IN FACT RESULT IN, HIS DEATH, CONSTITUTES A VIABLE GROUND FOR RECOVERY UNDER STATE TORT LAW. THAT ISSUE IS NOT BEFORE THIS COURT.

Petitioners' theory of the case at trial was that Hustler stimulated, enticed, or "incited" the deceased to engage in exceedingly dangerous conduct which was likely to result in, and did, in fact, result in his death. The jury believed petitioners' theory of the case, and the Court of Appeals found the evidence sufficient to support the facts (as opposed to mixed findings of fact and law) found by the jury. 814 F.2d 1021. The Court of Appeals further implicitly assumed that petitioners' theory constituted a viable ground for recovery under state law. See, here, Petition

for Writ of Certiorari at page 7.

III

THE COURT OF APPEALS APPLIED THE WRONG TEST. BRANDENBERG v. OHIO IS INAPPOSITE. A TORT ACTION BASED UPON "INCITATION" TO THE PRURIENT INTEREST IS CONTROLLED BY U.S. v. REBHUHN AND GINZBURG v. UNITED STATES.

The Court of Appeals applied the wrong test. Brandenberg v. Ohio, 395 U.S. 444 is inapposite. Brandenberg is a test which is applied to speech which is assumed to be protected by the first amendment, but which also involves "incitation" to imminent lawless activity.

Brandenberg has no application to speech which is outside first amendment protection for other reasons. It does not apply to "incitations" to the prurient interest; that is, it does not apply to subject matter: (1) which is obscene per se or (2) which "panders" to obscenity.

Incitations to the prurient interest in the form of obscenity per se are controlled by Roth v. United States, 354 U.S. 476, 485-486 (in Alberts, the trial Judge applied the test laid down in People v. Wepplo...whether the material has a substantial tendency to deprave or corrupt its readers by "inciting" lascivious thoughts or arousing lustful desires...") (1957); and Miller v. California, 413 U.S. 15 (1973).

"Pandering" is also outside the area of "free speech". Incitations to the prurient interest in the form of "pandering" to obscenity are controlled by U.S. v. Rebhuhn, 109 F.2d 512, cited with approval in Ginzburg v. U.S., 383 U.S. 463, 472-474:

> "The decision in United States v. Rebhuhn, 109 F.2d 512, is persuasive authority for our conclusion. That was a prosecution under the predecessor to section

1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to protection of the First Amendment, and 'could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written ..." 109 F.2d at 514. But the evidence, as here, was that the defendants had not disseminated them for their 'proper use, but ... woefully misused them, and it was that misuse which constituted the gravamen of the crime.' Id., at 515. Speaking for the the court in affirming the conviction, Judge Learned Hand said:

> ... The works themselves had a place, though a limited one, in anthropology and in psychotherapy. They might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage or barbarous peoples, or sexual aberrations; in other words, most of them were not obscene per se. In several decisions we have held that the statute does not in all circumstances forbid the dissemination of such publications.
>
> ... However, in the case at bar, the prosecution succeeded ... when it

showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limit; the circulars were no more than appeals to the salaciously disposed, and no (fact finder) could have failed to pierce the fragile screen, set up to cover that purpose. 109 F.2d, 514-515. (our emphasis)

IV

BEFORE THE COURT OF APPEALS MAY REVERSE, ON FIRST AMENDMENT GROUNDS, A JURY VERDICT WHICH AUTHORIZES REDRESS FOR TORTIOUS CONDUCT PURSUANT TO A VIABLE GROUND FOR RECOVERY UNDER STATE LAW, IT MUST MAKE AN INDEPENDANT EXAMINATION OF THE WHOLE RECORD, INCLUDING THE CHARACTER AND CONTENT OF THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE.

The Court of Appeals failed to perform its duty and obligation to make an independant examination of the the whole record in order to make

sure " that the judgment does not constitute a forbidden intrusion on the field of free expression." Perforce, this includes an examination of the character and content of the August, 1981 edition of Hustler Magazine, to determine, whether on the one hand, the magazine is, in fact, entitled to free speech protection or, on the other hand, is outside the protection accorded free speech either because: (1) the magazine is obscene per se; or (2) the magazine is pandered as obscenity; that is, it is manufactured, promoted, distributed, etc., for the purpose of "inciting" the prurient interest. See Justice Harlan's opinion in Roth v. United States, 354 U.S. 476, 497-498, 1 L.Ed.2d 1498, cited with approval in Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 506, fn. 25, 80 L.Ed.2d 502

at 520, fn. 25 (1984). See, also, Roth v. United States, 354 U.S. 476, 485-486, 1 L.Ed.2d 1498, 1507-1508 (1957). (In Alberts, the trial judge applied the test laid down in People v. Wepplo...whether the material has a substantial tendency to deprave or corrupt its readers by "inciting" lascivious thoughts or arousing lustful desires...); U.S. v. Rebhuhn, 109 F.2d. 512 (A prosecution... brought in the context of pandering of publications assumed useful to scholars and members of learned professions), cited with approval in Ginzburg v. U.S., 383 U.S. 463, 472-474 (the prosecution succeeded... when it showed that the defendant had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit).

V

THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE IS PER SE OBSCENITY. REASONABLE MINDS WOULD NOT DIFFER AND ALL REASONABLE PERSONS WOULD AGREE THAT HUSTLER IS OBSCENE AS A MATTER OF LAW (NOT FACT) UNDER THE FEDERAL STANDARDS SET FORTH IN MILLER v. CALIFORNIA.

Where obscenity per se exists, no further evidence is necessary on that issue, inasmuch as the court takes judicial notice of the fact that such finding is incontrovertible. See Mitchum v. State of Florida, 251 S.2d 298 (August 13, 1971), citing the federal cases United States v. Wild, 422 F.2d 34 (2nd Cir., 1970), Cert.den. 402 U.S. 986; United States v. Womack (Womack v. United States), 111 U.S. App.D.C. 8, 294 F.2d 204, 205-206, Cert.den. 365 U.S. 859; Kahm v. United States, 300 F.2d 78 (5th Cir.) Cert.den. 369 U.S. 859 and

Collins v. State Beverage Department, 239 S.2d 613 (Fla.App. 1970).

In Morris v. United States, 257 A.2d 341 (December 2, 1969), that court voiced the following test for material which was "obscene per se", i.e., obscene as a matter of law:

> "It is clear to this court that where obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. Womack, supra, Hudson, supra. In other words, if reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the government on its case in chief need not offer any evidence of national community standards..."

See, also, Wilhoit v. United States, 279 A.2d 505, Cert.den., 30 L.Ed.2d 546 (December 14, 1971) (Douglas would grant certiorari and set the case for

argument); U.S. v. One Reel of Film, 41 F.2d 206, 209 (July 16, 1973).

In Boreta Enterprises, Inc. v. Department of Alcoholic Beverage, 2 Cal. 3d 85, 84 Cal.Rptr. 113, 123 (1970), Justice Sullivan writing for a majority of the California Supreme Court acknowledged that the conduct at issue could be so extreme as to properly conclude that the subject matter was "per se" contrary to public morals. The recent decisions of the majority of this Court in Paris Adult Theater, Inc. v. Slaton, 413 U.S. 49, at page ___ (1973) and Kaplan v. California, 413 U.S. 115, 37 L.Ed.2d 491, 498 (1973) placed the validity of the concept of "obscenity per se" beyond peradventure.

A casual examination of the character and content of the August, 1981 edition of Hustler Magazine, a copy of which has

been lodged with the Clerk of this Court, discloses that Hustler Magazine is hard-core pornography under the federal standards expressed in Miller v. California, supra. Reasonable minds would not differ and all reasonable persons would agree that the August, 1981 edition is obscene per se. Pope v. Illinois, 481 U.S. ___ (May 4, 1987).

VI

THE ARTICLE ENTITLED "ORGASM OF DEATH" IN THE AUGUST, 1981 EDITION OF HUSTLER MAGAZINE AT PAGES 33-34 IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION. IT CLEARLY CONSTITUTES "PANDERING" UNDER GINZBURG v. UNITED STATES.

It seems clear beyond peradventure that Troy Daniel Dunaway was not reading "Orgasm of Death" at the instant of his death due to auto-erotic asphyxiation. The "incitement" just prior to the instant of death was undoubtedly derived from other portions of Hustler. See,

here, the copy of the August, 1981 edition which has been lodged with the Clerk of this Court.

Viewed abstractly, "Orgasm of Death" is not a legitimate scientific treatise on sexual practices. See the opinion of Circuit Judge Edith H. Jones at pp. 21(a) - 22(a) of the Petition for Writ of Certiorari. Even if it were so constructed by removal of the offending portions, such article would not acquire free speech protection under the circumstance of its comingling with the other hard-core pornographic articles in Hustler Magazine. See Flying Eagle v. United States, 285 F.2d 307 (1st Cir., 1961).

CONCLUSION

In reviewing the judgment which awarded damages under state law to redress injuries resulting from an "incitement" to prurient interest, the Court of Appeals should have been governed by the analysis in Rebhuhn

v. United States, supra, as specifically approved by this Court in Ginzburg v. United States, supra. Brandenberg v. Ohio is inapposite. The Court should grant the Petition for Writ of Certiorari and should set the case for briefing and arguments for all of the reasons set forth above.

Respectfully submitted,

Charles H. Keating, Jr.
Amicus Curiae

James J. Clancy
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day of July, 1987, copies of the within "Motion of Charles H. Keating, Jr., For Leave to File a Brief as Amicus Curiae in Support of Petitioners, with Brief annexed",were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Clinard J. Hanby
Haynes and Fullenweider
4300 Scotland
Houston, Texas 77007-7328
(713) 868-1111
Attorneys for Petitioners

David H. Donaldson, Jr.
Elizabeth A. Crabb
Graves, Dougherty, Hearon and Moody
2300 Interfirst Tower
Post Office Box 98
Austin Texas 78767
(512) 480-5600
Attorneys for Respondent, Hustler Magazine, Inc.

By: _____

James J. Clancy
Attorney at Law
9055 La Tuna Canyon Road
Sun Valley, California 91352
Attorney for Amicus Curiae

APPENDIX "A"

RECENT REPORTS ON THE "PRACTICAL ASPECT OF WHAT HAS BEEN HAPPENING -- SHOWING A RELATIONSHIP TO EXIST BETWEEN ANTI-SOCIAL CONDUCT AND OBSCENITY"

(REFERENCE: MOTION AT PAGE 3 AND PAGE 9, LINES 9 et seq.)

A-1
(The Daily Sentinel, Grand Junction, CO
April 21, 1984)

Boy learning by imitation

Youngster faces murder rap after 'copying' acts in porno slick

ST. PETERSBURG, Fla. (AP) — A 7-year-old boy testified that he and his 9-year-old brother were imitating actions they had seen in their mother's sex magazines when they assaulted an 8-month-old girl, who died of the attack, a lawyer said.

The older boy is on trial in juvenile court for first-degree murder, three counts of sexual battery and aggravated child abuse in the death of Barbara Parks last fall. The boys' mother was babysitting for the infant at the time.

The younger boy testified before Pinellas Circuit Judge Jack Page behind closed doors Thursday. In exchange for his testimony, all but one charge of aggravated child abuse against him is expected to be dropped.

Attorney Tom McCoun, representing the 9-year-old, said the younger boy testified he and his brother, in sexually assaulting the infant with a pencil and coat hanger, were mimicking what they had seen in their mother's sex books.

The mother has acknowledged keeping pornographic magazines and that the boys could have had access to them.

McCoun said he wanted the older boy to go to trial because the boy simply wasn't a murderer and the blame shouldn't rest on him.

"What I'm attempting to point out is that there are a whole lot more people to blame than my client. You've got parents who are totally irresponsible ... a home environment beyond description," said McCoun.

The boys have been held at the Pinellas County Juvenile Detention Center since Sept. 15, shortly after the baby died. Their names have not been made public.

The infant, who suffered Down's Syndrome and had a defective heart, was found on the floor in a bedroom where the two young boys were sleeping. She died shortly afterward.

Pinellas Medical Examiner Joan Wood testified that the cause of death was "blunt trauma" to the chest and abdomen, which she said was consistent with one of the boys kneeling on the child. She also said that the infant's heart problem was a contributing factor.

In open court, the 24-year-old mother of the boys testified that she was asked to mind little Barbara by the baby's grandmother, Ulla May Lee, the night of Sept. 14, 1983.

The baby's mother, Diane Lee, 19, testified that when she picked the infant up later that night, she noticed her body was limp and that she had a blackened eye, a nose bleed and darkened lips. Her shirt was torn and her finger looked like it had been bitten, she said.

The infant died shortly before midnight, she said.

(Sacramento Bee -- April 18, 1984)

Boy Charged With Assaulting Girl On Pool Table As Others Watched

By Todd Heath

PROVIDENCE, R.I. (AP) — A 12-year-old boy was arraigned Tuesday on charges that he sexually assaulted a girl on a pool table while other children watched, and officials said he may have taken the idea from watching the Big Dan's rape trial on television.

"The kid unfortunately watched too much stuff on TV," said Jack McMahon, head of the attorney general's juvenile prosecution unit. The girl who was allegedly assaulted is 10 years old.

The unidentified Pawtucket youth pleaded innocent to first-degree sexual assault in Family Court and was voluntarily undergoing counseling, McMahon said. He has been released to his parents.

McMahon described the boy as non-violent and "pint-sized at about 4 feet tall." He described the incident as "a good kid gone awry" and said the youth apparently already has learned his lesson. A pretrial hearing was set for May 4 and a trial for May 21.

Detective Stephen West said the boy was accused of making the 10-year-old girl perform oral sex then forcing her onto a pool table and further assaulting her. The attack came March 26, the same day four men were given sentences ranging from six to 12 years on charges of aggravated rape in Massachusetts.

In that case, authorities said a woman was held on a pool table and raped March 6, 1983, at Big Dan's Tavern in New Bedford, Mass., while other bar customers looked on. At Superior Court trials held in Fall River, Mass., two other men were acquitted.

(Sacramento Bee -- April 18, 1984)

The trials were the focus of national attention and large segments of it were carried live on Cable News Network.

According to West, the boy's mother said her son saw coverage of the trial. It was unclear how much the boy saw or whether he watched the trial on CNN or saw other TV news reports.

The boy was playing with four girls in his back yard when he asked one of them to his basement to play pool, West said.

The other girls were looking through a window and continued to talk about the incident for several days, West said. One of the girls' mothers, a friend of the victim's mother, overheard the conversation.

The victim's mother then approached the boy's family but was unsatisfied with the results, West said. She asked police to file charges.

McMahon and West said they did not know how severely the victim was affected.

Brown University lecturer Barbara Tannenbaum, who wrote her doctoral dissertation about the effects of television on children, said it would not be the first time a child viewed something on TV and then re-enacted it.

"And when you talk about news, in some ways it has more impact because it's real life," she said.

(The Dallas Morning News -- March 22, 1985)

Children attacking children

Rise in sex assaults by youngsters seen

By Melinda Henneberger
Staff Writer of The News

Two Dallas boys were held for questioning in an alleged sexual assault Wednesday of a 6-year-old girl, but were released because Texas law says investigators couldn't file charges.

The boys are 8 and 9 years old.

"They can't be prosecuted in a criminal court — I can't file a case with the DA's office," said youth investigator A.J. Watkins. Juveniles under the age of 10 are not criminally liable for their actions, he said.

The seriousness of the assault shocked police and members of the victim's family, who said the girl sustained a tear in her cervix and was treated and released from Parkland Memorial Hospital.

"I was kind of surprised," Watkins said. "Something this serious with kids this young is just not that common."

"I never thought it would happen to my child," the girl's mother said.

Rape crisis officials said the incident is one of a growing number of sexual assaults on children by other children.

"It's not infrequent," said Dallas County Rape Crisis Center Associate Director Jan Delipsey. She said she recently had a case in which a 5-year-old boy sexually assaulted a 3-year-old.

Ms. Delipsey said that, of the 40 or 50 cases of sexual assault involving children that are handled by the center each month, three to six cases involve incidents of children under the age of 12 sexually assaulting other children.

Although no statistics on the incidence of children sexually assaulting other children are available, rape crisis workers see that caseload rising for several reasons, she said.

"It's increased over the last few years, and a lot of that is the awareness that there is help available. But, too, as a society we're not dealing efficiently with adult perpetrators, so as the cycle continues, it (children sexually assaulting other children) will grow proportionately."

When children are sexually abused, she said, the incidence of their "acting out what's been done to them" with other children also increases.

Sexual abuse of children increased by more than 50 percent last year alone, she said, rising somewhere between 30 and 33 percent from 20 percent of all sexual assaults reported to the county center.

(The Dallas Morning News -- March 22, 1985)

Many of those incidents are never reported to the police, who refer such cases to Dallas County child welfare officials, officials said.

"I can't remember the last time I had a case like this," Watkins said.

"Rape crisis probably gets a lot of cases that we never see because they're not reported to police," said David Chassey, director of the child welfare program. "We don't get that many."

In Wednesday's incident, the 8-year-old boy involved "has done this before," said a witness and the victim's mother. No previous incidents were reported to police, and the suspects' parents doubt Wednesday's alleged assault ever occurred, either.

"I'm not concerned at all because it never happened," said the mother of the 8-year-old boy.

"I saw the other boy pulling his pants up, but the only thing I saw my boy doing was playing with a truck," said the 9-year-old suspect's father, who was at home when the incident occurred in his living room. He told police he thought the children were "just playing" under the dining room table, but both children told police they assaulted the girl — first in the back yard and later under the table, police said.

The 8-year-old reportedly began abusing boys and girls in the neighborhood after he saw some pornographic movies, said the witness and the victim's mother.

Exposure to pornography is a "passive form of abuse," Ms. Delipsey said, and can also continue the cycle of abuse.

To break the cycle, Ms. Delipsey recommends awareness and counseling rather than punishment.

"They should seek therapy and not be quick to label the child as bad," she said.

"The first concern is to make sure they're not being abused by an older person. We tell them, 'Your body belongs to you, and if an adult tries to touch it, it's because that person has probiems.'"

Child welfare workers treat "each case as special and individual," said investigator Larry Billingsley.

After an investigation, child welfare workers may recommend several solutions — ranging from counseling to placement in a foster home or in the children's ward of Terrell State Hospital, he said.

(Dover, Ohio, Times Reporter -- February 1, 1985

Strasburg boy given probation in sex case

A Strasburg teen-ager, who was found delinquent for having sexual contact with five young children, will remain at home and not be placed in a treatment center.

Tuscarawas County Juvenile Court Judge George Demis Thursday placed the 14-year-old boy on two years probation and ordered that he and his family continue counseling. The teen also is to serve 60 days in a summer work program and must observe a curfew and improve his grades.

Demis added, however, that the youth will be placed in a treatment center if he commits any similar acts again. The judge said he will review the case in June.

In December, Demis ruled the boy delinquent by gross sexual imposition for incidents with five children, ages 2 to 5, between July 4 and Aug. 18. Testimony from two mothers and one victim indicated the incidents took place in the boy's home, where his mother was babysitting the other children. The mother reportedly was not in the house at the time.

AT THURSDAY'S hearing, Demis ordered that the family obtain a new counselor after Dr. Mary Katherine Villwock, a New Philadelphia psychologist who has been counseling the boy, testified that she didn't believe all of the allegations against him were valid.

Demis said he believed Villwock was not helping the boy by supporting his denials about the incidents.

Villwock said she thought some of the boy's earlier statements — in which he indicated he had sexual contact with some of the children — were made because he felt pressured by an employee of the Tuscarawas County Department of Human Services.

The boy's attorney, Willard Hanner, and assistant county prosecutor Wendy Rockenfelder agreed with recommendations from Villwock and other psychologists that the boy should remain with his family.

Villwock described the boy as introverted but said she believes he has matured and is developing a better relationship with his family. She said the boy told her he was involved in an incident with one of the children, but that it did not involve sexual contact, and that he had been influenced by programming on a pay television channel. Demis criticized the parents for subscribing to the channel, although they said they have canceled it.

(Columbus Citizen Journal -- April 19, 1985)

Rape charge shocks community

By THOMAS HOLDEN
CJ Staff Writer

The sun set at 6:49 p.m. on March 28, about the time three Hilliard boys headed home from an afternoon of flying kites. They heard what sounded like crying.

The sounds came from beneath the stage of a small amphitheater in Municipal Park, a pleasant, spacious place with a small man-made pond behind the open-air theater.

When the three investigated the sounds, they found a boy hiding under the cramped space of the stage with a collection of pornographic magazines. Inside was a foam mattress and a can of oil that had been used as a makeshift light.

Twelve days later, on April 8, the 12-year-old boy who had been hiding under the stage was charged with two delinquency counts of raping one of the three youngsters who had been flying kites. Another one of the three boys was charged with two counts of complicity in the incident.

The victim is 10 years old and retarded.

The crime has shocked the community and left police wondering how it could have happened.

"I've been in law enforcement for 18 years, and I've never seen a homosexual rape between two boys so young before," Hilliard Police Lt. Ron Bush said yesterday. "I just don't know what to attribute it to."

Bush gave this account of the crime:

The 12-year-old who had been hiding under the stage was imitating the sounds of someone crying in an effort to attract attention. After the three younger boys found him, the 12-year-old joined the trio and they headed south toward Snow Hill on their way home.

Sometime between 7 p.m. and 7:30 p.m., with darkness setting in, the 12-year-old said he wanted to have sex with the 10-year-old, Bush said.

Based on interviews with the four, Bush said he determined that the 10-year-old refused until another boy, who is 11, picked up a stick and hit the retarded boy until he consented.

At that point, a second 11-year-old ran home to tell his mother. And while he was gone, Bush said, the oldest boy raped the retarded youth on the side of the hill while the stick-wielding 11-year-old watched.

Bush said the older boy is large for his age, about 5 foot, 10 inches tall, and 200 pounds. The victim is smaller, about 5 foot, 6 inches.

"If it hadn't been for the 11-year-old who ran home to tell his mother, we probably never would have found out what happened," Bush said.

After the crime, police had the entryway to the stage boarded shut.

The incident made the front page of The Northwest News, Hilliard's weekly newspaper. Wayne Brown, the editor, said several people called about the newspaper's account of the crime to complain about the detailed description.

Otie Blankenship, who owns Otie's Town Pub, a popular restaurant and tavern near the center of town, said, "People at the bar were kind of shocked. You know, it makes you stop and think about all the times you've said it could never happen here. ... I've been here 25 years, and I've never heard of anything like this happening here before."

Bush said all of the boys are from good families whose parents work hard and care for their children. None of them has any previous contact with the police.

(Columbus Citizen Journal -- April 19, 19

Boy, 10, charged with rape

Youngest

Officers arrested the boy on the basis of information furnished by witnesses who saw him run from the scene. One witness followed him to his house and called police.

London officers say the child is the youngest rape suspect they have ever arrested.

"After we talked to his parents and took the boy into custody, we searched his room," says a police spokesman.

"We found dozens of pornographic magazines, nude photos, and other sexually-explicit materials. His parents were shocked. They didn't have any idea how the stuff got there.

police she was on her way home from school when the boy, wearing a mask, jumped out of the bushes and grabbed her.

He pulled her into the row of hedges, she says, and proceeded to tear off her clothing while threatening her with a penknife.

A psychiatrist who examined the boy following his arrest says, "The child told me he got his ideas from reading magazines with pictures of nude men and women.

"He said he wanted to be like the men he saw in the magazines and on TV."